IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SECOND APPEAL NO. 1255 OF 2004

Mr. Mhasku Laxman Wachakal
(Since deceased by his Legal
Representatives
1(a) Smt. Sulochana Mhasku Wachakal ... Appellants.

V/s.

Mr. Govind Shhidu Wachakal
(Since deceased by his Legal
Representatives
1(a) Smt. Radhabai Govind Wachakal. ... Respondents.

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Mr. G.S. Godbole for the Appellants.
Mr. S.S. Kulkarni for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD,J.

11TH JULY 2007.

P.C. :-

. Admit.

2. The following substantial question of law arises :-

(i) Did the Appellate Court have the jurisdiction in law to hold that the tenancy of

Survey 15/2 stood in the name of Laxman for and on behalf of the Hindu Undivided Family and that consequently, the aforesaid lands were liable to be partitioned, despite the bar of jurisdiction under Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948.

3. A suit for partition was dismissed by the Civil Judge, Junior Division. An Appeal was filed against the judgment of the Trial Judge which has been disposed of by the impugned judgment of the Additional District Judge, Pune dated 15th July 2004. The Appellate Court has directed that the Plaintiff is entitled to partition and separate possession of his 1/4th share by metes and bounds, in respect of the properties described in paragraphs 1a to 1d of the plaint. Consequential directions have been issued under the provisions of Section 54 of the Code of Civil Procedure, 1908.

4. At the hearing of the Second Appeal, Counsel appearing on behalf of the Appellants has confined his submissions only in respect of the decree for partition in so far as it relates to Survey No.15/2 which

corresponds to new Gat No.2216. The learned Counsel has informed the Court on instructions that the rest of the decree is not challenged on behalf of the Appellants.

5. The facts lie within a narrow compass. The common ancestor was Sidhu Mukinda Wachakal, who died in 1955, leaving behind him four sons namely, Laxman, Govind, Baba and Bhiku. During the life time of Sidhu, the tenancy of Survey No.15/2 stood in his name ever since 1920 until about the year 1946-47. Sidhu sustained severe injuries in an accident in 1942 and it has been alleged that in 1946-47 the tenancy was mutated in the name of Laxman, the father of the Third Defendant, who was also the eldest son. According to the Plaintiff, the name of Laxman came to be inserted in his capacity as the Karta of the Hindu Undivided Family. On the other hand, the Appellants before the Court who are original Defendants 1 to 6 contend that Laxman came to be recorded as a protected tenant under the Bombay Tenancy and Agricultural Lands Act, 1948 and became the purchaser of the land. The lands were acquired by the Government of Maharashtra for the purpose of a Weir dam. Since the lands were not

required for the purpose for which they were acquired, eventually, in exercise of the powers conferred by the Maharashtra Disposal of Government Lands Rules, 1971, a grant was effected by the State Government in respect of the said lands in favour of Laxman.

6. On these facts, it has been urged on behalf of the Appellants that the question as to whether the lands were held by Laxman as a tenant in his individual capacity (as the Appellants contend) or as Karta of the H.U.F. (as was contended by the Plaintiffs and accepted by the Appellate Court) is a matter which squarely fell within the jurisdiction of the Mamlatdar under Section 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948 and the jurisdiction of the Civil Court stood ousted under Section 85.

7. The question which arises before the Court is not res integra. Section 85 of the Act postulates that no Civil Court shall have jurisdiction to settle, decide or deal with any question (including a question whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him) which

is by or under the Act required to be settled, decoded or dealt with, inter-alia, by the Mamalatdar or in appeal or revision. Section 70(b), inter alia, prescribes that one of the duties and functions to be performed by the Mamlatdar is to decide whether a person is a tenant or a protected tenant.

8. A Full Bench of this Court held in **Rajaram Totaram Patel V/s. Mahipat Mahadu Patel** (69) Bombay Law Reporter 282 that Section 70(b) does not stipulate that the question thereunder must be decided only if it is raised by a landlord or by a tenant and there is no reason why an issue of tenancy cannot be decided whether raised by a tenant or a landlord or by a co-tenant or any other person. The Full Bench held that the issue as to whether the Plaintiff or the Defendant or both were tenants clearly fell for resolution under Section 70(b) before the Mamalatdar.
The jurisdiction of the Civil Court was hence ousted.

9. The Provisions of the Act were also interpreted by the Supreme Court in **Saraswatibai Trimbak Gaikwad V/s. Damodhar D. Motiwale** AIR 2002 S.C.1568. The Supreme Court held that the Civil Court does not have

jurisdiction to decide the matters which are required to be dealt with by the Tribunal under the Act and it is only the Tribunal which can decide whether a person is deemed to be a tenant and whether he is entitled to purchase the land held by him. While considering the provisions of the Karnataka Land Reforms Act, 1962 in **Mudakappa V/s. Rudrappa** AIR 1994 S.C.1190, the Supreme Court dealt with the provisions of Section 48A under which one of the duties of the Tribunal was to decide whether a person is a tenant or not. The Supreme Court held thus :-

> " When inter se rival claims for tenancy rights have been set up, it has been empowered with jurisdiction to decide that question as to who is the tenant in possession of the land prior to the date of vesting and entitled to be registered as a tenant with the State Government and its decision shall be final. The Civil Court's jurisdiction under Section 9 of C.P.C. by necessary implication, therefore, stood excluded."

Consequently, it was held that when a question arose as to whether an individual coparcener or the joint family is the tenant, that question should be decided by the Tribunal alone and not by the Civil Court.

10. However, on behalf of the Original Plaintiff, it has been submitted that in the present case it has been conceded that the tenancy stood in the name of Laxman and there was therefore no occasion to make a reference under the Tenancy Act on the question of tenancy. Secondly, it was urged that it was the case of the Appellant that there was an oral partition of the lands which were described, inter alia, in para 1-B of the plaint and once this case is dis-believed, no further question will survive. The submission however cannot be accepted. From a Perusal of the pleadings, it is evident that it was the case of the Plaintiff that though the tenancy stood in the name of Laxman, the lands were held by him not in his personal capacity but as Karta of the H.U.F. and that the tenancy must ensure to the benefit of the H.U.F. The question as to whether the tenancy was held by Laxman in his individual capacity or as Karta of the H.U.F. clearly

fell within the jurisdiction of the Competent Authority under the Tenancy Act. Having regard to the provisions of Section 70(b) that question could not have been resolved by the Civil Court, in view of the bar of jurisdiction under Section 85. In so far as the second limb of the argument is concerned, while it is correct that one of the defences in the written statement of the Appellant was that an oral partition had taken place, that plea cannot be viewed in isolation from the other parts of the written statement in which a plea has been set up that Laxman was a protected tenant and was a purchaser.

11. In the circumstances, having regard to the settled position in law, it would be appropriate and proper if the following issue is raised with a direction to the Appellate Court to forward the issue to the tenancy authorities for adjudication in accordance with the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 :-

(i) Was the tenancy in respect of the lands bearing Survey No.15(2), corresponding to Gat No.2216, held by Laxman in his personal capacity

or in his capacity as Karta of the H.U.F.?

12. The Appellate Court shall upon receipt of a certified copy of this order remit the aforesaid issue for a decision by the tenancy authorities expeditiously. The Tenancy Authorities are directed to expedite a decision thereon, having regard to the long pendency of the suit and to endeavour to do so within a period of six months from the date of receipt of the order of the Appellate Court.

13. The Second Appeal shall accordingly stand allowed in part to the extent to which the Appellate Court decreed the suit for partition in respect of Survey No.15/2. That part of the decision shall stand quashed and set aside. Civil Appeal 309 of 1988 shall stand restored to the file of the District Judge, Pune. The Civil Appeal shall be disposed of upon receipt of the determination by the tenancy authorities, in accordance with law. It is however clarified by the consent of Counsel appearing on behalf of the parties and at their request that the decree for partition passed by the Additional District Judge, Pune on 15th July 2004 in respect of properties other than Survey No.15/2 shall

not be disturbed since that has not been questioned in the submissions before this Court.

14. The Second Appeal is accordingly disposed of. In the circumstances of the case, there shall be no order as to costs.